

FREEDOM
OF
INFORMATION

1988
ANNUAL REPORT
OF THE
OMBUDSMAN

Note: Errata

Page 9, 4th paragraph, last sentence

**Reads "is final and binding and
there is further appeal."**

**Should read "is final and binding
and there is no further appeal."**

Ombudsman Manitoba

First Annual
Report of the
OMBUDSMAN

For the period
January 1st, 1988 -
December 31st, 1988

Presented to the Legislature pursuant
to Section 55 of
The Freedom of Information Act

Ombudsman Manitoba

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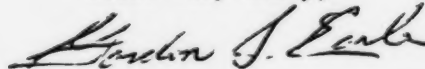
750 — 500 Portage Avenue
Winnipeg, Manitoba R3C 3X1
Telephone: (204) 786-6483

The Honourable Denis Rocan
Speaker of the Legislative Assembly
Province of Manitoba

Dear Mr. Speaker:

In accordance with Section 55 of The Freedom of Information Act, I am
pleased to submit the first report of the Ombudsman for the calendar year
January 1, 1988 to December 31, 1988.

Yours very truly,



GORDON S. EARLE
OMBUDSMAN



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An Overview of The Freedom of Information Act

The Freedom of Information Act was enacted by the Legislative Assembly of Manitoba and received Royal Assent on July 11, 1985. The Act, however, was not proclaimed in force until September 30, 1988.

The Freedom of Information Act applies to provincial government departments and agencies. Excluded from the definition of Crown agency are the Provincial Auditor, Chief Electoral Office and Ombudsman and hence the Act does not apply to these officers of the Legislature. As well, the Act does not apply to municipal government departments and agencies, nor does it apply to private business or industry.

The basic principle of The Freedom of Information Act is that every person, upon application, has a right of access to any record in the custody or under the control of a department or agency including any record which discloses information about the applicant. However, while granting a basic right of access to information, the Act at the same time attempts to ensure the protection of privacy rights of individuals and legitimate confidentiality needs of government.

Because of its combined function of ensuring access to information while at the same time protecting privacy and confidentiality, The Freedom of Information Act sets forth very precisely what categories of information are exempt from release either on a mandatory or discretionary basis. There are twelve categories of exempt information under The Act, four mandatory and eight discretionary. The four mandatory exemptions include records that involve: Cabinet confidences; personal privacy of a third party; third party confidential commercial information; and records obtained in confidence from another government or authority. The eight discretionary exemptions include records that involve: policy opinion, advice or recommendations including plans relating to administration, and draft enactments; law enforcement and legal proceedings; personal privacy of third parties; the economic interest of Manitoba; federal-provincial relations; testing or auditing procedures; material to be made public; third party reports; and information the disclosure of which might result in physical or serious psychological harm. The Act goes one step further and clarifies under what conditions a right of access may be preserved even in categories where information has been exempted.

The Freedom of Information Act also sets forth the process by which departments and agencies must respond to applications for access spelling out such things as: the time period applicable in responding, the extension of time limits, the forwarding and transferring of applications for access, the procedure for granting access, the process of severing accessible information from exempt information, and the requirement to notify applicants of their appeal right.

There are four situations where applicants may wish to launch an appeal under The Freedom of Information Act, namely:

- 1) where the applicant has not received a reply to an application within the thirty-day response time (a presumed refusal of access);
- 2) where an applicant has received, and objects to, notice that the government wishes to extend the thirty-day response time;
- 3) where an applicant has been refused access to all or part of the record applied for; and
- 4) where an individual has a complaint relating to the adequacy and availability of The Access Guide.

An applicant has a right of appeal to the Ombudsman in these four situations, and a further right of appeal to the court where access continues to be refused after a complaint has been filed with, and investigated by, the Ombudsman. It may be that the Ombudsman has investigated and recommended partial or total access and the department maintains its original position or grants partial access while the applicant wishes access to more than what is being granted or recommended; or, it may be that the Ombudsman has investigated and is of the opinion that access should not be granted, and hence makes no recommendation in favour of the applicant. In either case the applicant may appeal the refusal of access to the court by filing an originating notice of motion within thirty days of receiving the Ombudsman's report.

The Investigation of Complaints

The process the Ombudsman uses for investigation of complaints under The Freedom of Information Act is really quite simple and straight forward with many of the procedural elements being spelled out in the Act itself.

Although the Act places no time restriction on the Ombudsman for completing investigations, the Ombudsman had set an internal goal of a thirty day time period for completing complaints. However, none of the complaints received in 1988 were completed within that time frame. The length of time and the adequacy of resources for the proper investigation of these complaints is something that the Ombudsman shall be watching very closely over the next year.

While, under The Freedom of Information Act, the Ombudsman does have some discretion to attempt an informal resolution of a complaint by undertaking such procedures as deemed appropriate the Ombudsman must nevertheless at all times act in a manner consistent with the spirit of the Act. There are some requirements which the Ombudsman cannot waive in the course of performing his duties and responsibilities under the Act. It is important to understand that under The Freedom of Information Act, the Ombudsman does not have the same discretion that he has under The Ombudsman Act to refuse or cease to investigate complaints. Under The Freedom of Information Act the Ombudsman **shall** receive and investigate **every** complaint about the refusal of access, response-time extension, and the availability and adequacy of the Access Guide. There is no provision under the Act to refuse frivolous or vexatious complaints, complaints aimed simply at testing the system, or complaints which may date back in time.

Another important point to note is that the Ombudsman has no authority to waive the requirement that complaints under The Freedom of Information Act be in prescribed form. The Act very clearly states that every complaint should be in prescribed form, and to that end a complaint form has been prescribed by regulation under the Act and that form is to be used for all complaints. We have had one complainant express concern about the compulsory use of forms to file Freedom of Information complaints with the Ombudsman, and we have made it very clear that it is a matter over which the Ombudsman has no control, and is in fact a matter which should be pursued with the politicians if a change is desired in that regard. However, the compulsory use of complaint forms should not hinder individuals from making complaints to our office, as we always stand pre-

pared to assist those who are having difficulty with, or are unable to fill out, the form. Also, although the form itself must be used, individuals are not limited to the form and may attach supporting documentation and any additional information they feel is appropriate to assist in explaining the particulars of the complaint.

For the purpose of investigating complaints under The Freedom of Information Act, the Ombudsman has all the powers of a commissioner appointed under Part V of the Manitoba Evidence Act which means that the Ombudsman can conduct a very formal investigation, if need be, taking evidence under oath or affirmation, issuing subpoenas and warrants, and entering upon and inspecting premises at any time. This right of entry is also spelled out specifically in The Freedom of Information Act in that the Ombudsman has, for the purpose of investigating a complaint, the right to enter any office of a department and examine any record in the custody of the department; and to converse in private with any officer or employee of a department. It is important for the public to understand that no person shall withhold from the Ombudsman any record or information required for the purpose of an investigation and that it is a punishable offence to, without lawful justification, willfully hinder or obstruct the Ombudsman in the performance of his duties or functions under the Freedom of Information Act.

The Ombudsman shall conduct every investigation in private and shall maintain secrecy in respect of all matters which came to his knowledge in the course of any investigation. Despite this basic principle of privacy and confidentiality in investigations the Ombudsman may in certain situations disclose any matter he considers necessary to disclose in order to facilitate the investigation. We have had one complainant indicate concern that the Ombudsman, at the outset of investigating a complaint will present the department or agency concerned with a copy of the complaint presented to our office. This individual felt that this was somehow a violation of the confidentiality of his complaint. However, it is the Ombudsman's position that a department or agency that has refused access to an applicant, and has presented that applicant with reasons for the refusal, has a right to know that the applicant has complained to our office, and the right to know exactly what the complaint is so that the appropriate, and proper response can be given to the Ombudsman's inquiry on the matter. The best way to inform the department or agency in that regard is to present the complainant's concerns in the complainant's own words directly to the department or agency by way of a copy of the complaint form. We

have sometimes found that the presentation of a complainant's concerns in the complainant's own words, has led to the clarification of confusion that may have surrounded the initial application for access and has thereby facilitated a resolution of the complaint.

Upon receipt of a complaint a letter is sent to the complainant acknowledging receipt of the complaint and indicating that action will commence on the concern immediately. Contact is made with the department or agency, usually a phone call, followed up by a personal interview with the access officer for the department or agency although in some cases (e.g. a presumed refusal of access) a letter may be sent. In any event, the department is presented with the complaint and the department's position on the matter is obtained. Files are reviewed and in cases where information has been exempted or severed, copies of those records may be obtained for our files and for further review by the Ombudsman. During the course of the investigation the Ombudsman gives both the complainant and the head of the department involved a reasonable opportunity to make representations respecting the complaint. This is usually done by way of a personal interview at the Ombudsman's office.

It is important to remember that in investigating complaints the Ombudsman is impartial and objective, and while he gives consideration to both the views of the complainant and the department, ultimately the Ombudsman reaches his decision based upon the evidence and his own understanding of what is exempt information and what is accessible information according to The Freedom of Information Act. What this means quite simply is, that the Ombudsman may very well reject a department's reason for exempting information from disclosure, and yet, at the same time refuse to recommend that access be granted to the applicant. This may be because the Ombudsman is satisfied that under The Freedom of Information Act, the information the applicant is seeking is in fact exempt, but not necessarily under the section or sections of the Act cited by the department. Because the department, in the Ombudsman's opinion, may have used the wrong exemption clause to deny access, does not make the information accessible and does not entitle the Ombudsman to recommend release. In fact, it would be quite inappropriate for the Ombudsman to recommend access in such a situation, and furthermore, the Ombudsman would be remiss in his duty if he did not present his findings, views and opinions, as required by the Act to both the applicant and the department.

Once the complaint has been thoroughly investigated and the Ombudsman has reached a decision on the matter he sends to the complainant and to the head of the department a report containing the findings of the investigation and any recommendations he considers appropriate.

Where the Ombudsman has investigated a refusal of access complaint and has found the complaint not justified, the report to the applicant would indicate the right of the applicant to appeal to the court for access to the record and the time limit for filing an appeal.

Where the Ombudsman has investigated a refusal of access complaint and has made recommendations, the department shall within fourteen days of receiving the report respond, in writing, to the Ombudsman indicating any proposed action to implement the recommendations or the reasons why the recommendations will not be implemented. The Ombudsman upon receipt of such response will report further to the complainant. If the response of the department has indicated acceptance of the Ombudsman's recommendations and if the department has agreed to give access to a record referred to in the complaint, such access shall be given within ten days. If the response from the department has indicated rejection of the Ombudsman's recommendation that access be granted, then the Ombudsman in reporting further to the complainant will indicate whether or not, in the opinion of the Ombudsman, the department's response is justified, the right of the applicant to appeal to the court for access to the record, and the time limit for filing an appeal.

It has been indicated earlier that there is under The Freedom of Information Act, a right of appeal to the Ombudsman concerning not only a presumed and actual refusal of access but also, concerning an extension of the thirty-day response time and the adequacy and availability of the Access Guide. It should be noted that the further appeal beyond the Ombudsman to the court applies only to the refusal of access complaints. In such cases, the decision of the court is final and binding and there is further appeal.

Apart from the subjects mentioned as appealable under The Freedom of Information Act, there is one other subject that may cause concern to applicants, and that is the matter of fees payable for access to records. Under The Freedom of Information Act, the Lieutenant Governor in Council has made regulations prescribing fees payable for access to records. Suffice it to say that the fee schedule and the fact

that fees can be charged is not a matter over which the Ombudsman has any jurisdiction; rather, such a matter would have to be pursued with the law-makers, i.e. the politicians, if one desires a change in that regard. I note that applicants are fully informed on the Application for Access form that they may be asked to pay certain costs as prescribed by regulation before gaining access to the record.

While the actual fee schedule itself and the fact that fees can be charged are not matters over which the Ombudsman has jurisdiction, the Ombudsman does have jurisdiction, under The Ombudsman Act, to review concerns that applicants may have about the administrative application of the fee schedule by departments and agencies. In other words, if an applicant has any concern that a department or agency may be improperly applying the fee schedule, that matter can and certainly will, if brought forward, be reviewed by the Ombudsman.

The Freedom of Information Act allows the Ombudsman to delegate to any person the authority to investigate a complaint, and any person so authorized may exercise the powers and shall perform the duties and functions assigned to the Ombudsman under this Act. It is important to understand that except in a prosecution for an offence under the Act: no statement made in the course of an investigation by the Ombudsman is admissible against any person in a court or in any other proceeding; no report made by the Ombudsman regarding an access complaint and no notification given by the Ombudsman regarding the applicant's appeal right to court, is admissible in a court or in any other proceeding; and the Ombudsman shall not be called to give evidence in a court or in any other proceeding concerning any matter which comes to the knowledge of the Ombudsman in the course of any investigation.

Finally, it should be noted that no proceeding lies against the Ombudsman, or any person employed by or acting under the authority of the Ombudsman, for anything done, reported or said in good faith in the exercise or performance of the powers, duties and functions of the Ombudsman under this Act.

The Access Guide

The Freedom of Information Act provides that an Access Guide be published. The Access Guide identifies and describes government record systems, where records are located, how long they are kept, and what kind of information they may contain. Also, the Access Guide contains: instructions on exercising the right of access under the Act; a list of personnel involved in the administration of the Act; a description of the organizational structure of each department; and a copy of The Freedom of Information Act and regulations.

As mentioned earlier the Ombudsman shall receive and investigate every complaint relating to the adequacy and availability of the Access Guide. During 1988 our office did not receive any complaints regarding the Access Guide. The one comment I would make at this point, regarding the Access Guide is that perhaps the name is a bit misleading and possibly the guide should be more appropriately referred to as the Information Guide. There have been some instances where people complaining to our office about refusal of access to records have expressed their view that they should have been granted access since the records are listed in the Access Guide. In other words, these people felt that the mere listing of the information in a guide called the Access Guide meant that the information should automatically be accessible to the public. They did not understand that the Access Guide simply lists all information maintained by government departments and accessibility to that information is not automatic but rather, is determined by examining that information in light of The Freedom of Information Act.

Terminology for Concluding Complaints

It is important, both for our records and for the public that we give an indication of how complaints presented to the Ombudsman have been handled. With the freedom of information complaints, I have attempted to use terminology which will explain as simply and yet as comprehensibly, as possible the outcome of our investigations. In this regard, I have patterned my terminology after that of the Information Commissioner of Canada and have used terms which hopefully serve a three fold purpose, namely to describe the finding, disposition and result of our investigation of a complaint.

Finding — At the conclusion of an investigation our finding might be that we supported or partially supported the complaint; did not support the complaint; or were unable to make a determination on the matter.

Disposition — Based upon our findings, our cases are then disposed of by way of a report with or without recommendations, or a report dismissing the complaint; or the disposition of a complaint may be that it was resolved informally or discontinued by the complainant.

Result — The result of disposing of cases through reports, informal resolutions or discontinuance could be that remedial action is taken, insufficient action is taken, or no action is required.

The following chart illustrates the possible combinations of findings, dispositions and results that might follow from the investigation of a complaint. For example from the chart you can see that a complaint could be closed with a finding, disposition, and result (FDR) as follows: Supported; Report with Recommendation; Remedial Action. Another possible FDR would be: Undetermined; Discontinued by Complainant; No Action Required.

FDR'S For Freedom of Information Complaints

FINDING	Supported	Partially Supported	Not Supported	Undetermined
DISPOSITION	Report, with Recommendation Report, No Recommendation Resolved Informally Discontinued by Complainant	Report, with Recommendation Report, No Recommendation Resolved Informally Discontinued by Complainant	Report Dismissing Complaint Discontinued by Complainant Resolved Informally	Discontinued by Complainant
RESULT	Remedial Action No Action Required Insufficient Action	Remedial Action No Action Required Insufficient Action	No Action Required	No Action Required

Accessibility to Information Relative to Ombudsman Investigations

I have mentioned earlier in this report that The Freedom of Information Act does not apply to the Ombudsman and hence individuals do not have a right of access to records maintained in the Ombudsman's Office. However, the Ombudsman deals daily with numerous government departments and agencies in the course of investigating complaints against, and matters relating to, those departments and agencies. In so doing there are many pieces of correspondence, memos, letters, and reports, that are submitted by the Ombudsman to those departments and placed on their files. What then, is the status of those records in terms of their accessibility to the public? Is this information exempt from public consumption simply because The Freedom of Information Act does not apply to the Ombudsman or should this information be viewed differently because it is not information in the Ombudsman's office, but rather information that is now in the custody or under the control of government departments or agencies?

The answer to the above question quite simply is that while information in files at the Ombudsman's office are not subject to The Freedom of Information Act, any information in the custody or under the control of a department, including information from the Ombudsman **is** subject to The Freedom of Information Act. It is my opinion that once our correspondence is placed in files of government departments and agencies, it becomes a part of those files and consequently is not automatically exempt information under The Freedom of Information Act. An onus rests with the department or agency to whom a request for access is made to consider the records being asked for, in light of the exemptions under the Act. It is the department's responsibility to make a decision, using the Act as a guide, on whether or not to give access to records or communication obtained from our office.

Departments and agencies pondering the release of Ombudsman information which may reside on their files would likely want to give consideration to the mandatory exemption dealing with Cabinet confidences, since reports from the Ombudsman to a Minister or to Cabinet would likely fall within this exemption. Also, all the other mandatory exemptions should be considered (personal privacy of third parties, third party confidential commercial and other

specified information, and records obtained in confidence from another government or authority) as reports or correspondence from the Ombudsman's office may very well touch upon all these areas.

The discretionary exemptions should also be examined by departments and agencies as Ombudsman correspondence often deals with opinions, advice or recommendations, administrative plans, draft enactments; economic, financial and other interests of Manitoba; federal-provincial relations; testing or auditing procedures; records about to be made public; third party reports or opinions; and records which if disclosed, might result in physical or serious psychological harm to someone.

Perhaps the most important discretionary exemption to be considered when pondering the question of the release of Ombudsman originated information is the exemption relating to law enforcement and legal proceedings. This exemption allows the department discretion regarding giving access to any record the disclosure of which could reasonably be expected to be injurious either to the enforcement of an enactment or to the conduct of an investigation under an enactment. Departments must take care not to release information received from the Ombudsman during the course of an investigation, if the release of that information will be injurious to the proper conduct of the Ombudsman's investigation under The Ombudsman Act. This same exemption concerning law enforcement and legal proceedings deals with information the disclosure of which could threaten the security of a correctional institution and Ombudsman investigations and reports deal often with such matters. As well, this exemption deals with information the disclosure of which might affect solicitor-client privilege and anticipated legal proceedings and such information may sometimes come under discussion in Ombudsman correspondence.

In conclusion, I would say that while a lot of Ombudsman material on department files may very well fall under one exemption or another under The Freedom of information Act, other information may be quite accessible. There is no blanket or automatic exemption on information from the Ombudsman's office residing in government files. Each request must be looked at on its own merit and the department must make its own decision based upon the appropriate application of The Freedom of Information Act to the request for access.

Statistical Information

As mentioned earlier in this report The Freedom of Information Act came in force on September 30, 1988. During October, November and December of 1988, there were eight complaints received. All eight complaints concerned refusal of access to either all or part of the records for which application was made. There were no complaints received concerning extensions of the 30-day response time nor were any complaints received relating to the adequacy and availability of the Access Guide.

Of the complaints received in 1988, at the time of writing this report all were concluded but two. Regarding the two complaints that are pending, each of these were filed by the same two individuals acting jointly on each complaint. These two complaints remain open only because to date, we have been unsuccessful in having these two individuals meet

with us to discuss their concerns despite several attempts by our office to make appropriate arrangements.

Of the six complaints that have been closed, all but one was closed within a three month time period. The one that took longer was closed in a little over six months; however in that case, the complainant had indicated that he was not overly concerned about the time it might take to conclude the complaint because even more so than access to the specific information he had been denied, the complainant was interested in a long term systemic change which would make the type of information he had been denied accessible in the future. As well, the nature of this case was somewhat more complicated and required a fair amount of research and consideration by our office.

The eight complaints received are summarized in the following chart:

NO.	COMPLAINT	DEPARTMENT/ OTHER	FDR	INVESTIGATION TIME
1.	Refused access to part of record or records	Government Services	Partially supported; Report, with Recommendation; Remedial Action	2 months, 11 days
2.	Refused access to part of record or records	Government Services	Not Supported; Report, Dismissing Complaint; No Action Required	6 months, 17 days
3.	Refused access to part of record or records	Attorney General	Not Supported; Report, Dismissing Complaint; No Action Required	2 months, 20 days
4.	Refused access to records	Corporations & Extra Departmental	Pending	Over 7 months
5.	Refused access to records	Civil Service Commission	Pending	Over 7 months
6.	Refused access to records	Municipalities, Cities, Towns	Undetermined; Discontinued by Complainant	2 months, 13 days
7.	Refused access to records	Northern Affairs	Partially Supported; Report with Recommendation; Remedial Action	3 months
8.	Refused access to records	Government Services	Not Supported; Report Dismissing Complaint; No Action Required	2 months

Case Summaries

An Unreasonable Invasion of Privacy

88-260-0001-F3 **Manitoba Government Services**

Complaint: Refusal of Access
Finding: Partially Supported
Disposition: Report, With
Recommendation
Result: Remedial Action

A former government department employee filed a complaint concerning the refusal of the department to grant him access to all the records he had requested. Specifically, the applicant had requested that he have access to all records relating to his employment including interdepartmental memos, letters, documentation concerning disciplinary actions, suspensions, and his dismissal. In particular, he was seeking records concerning an incident involving third parties which he felt ultimately led to the termination of his employment. The department had responded to the applicant's request by granting partial access, exempting certain information under Subsection 48(1) of the Act which deals with third party reports. The applicant felt that this information should not have been severed from the file. He believed the information was instrumental in bringing about his dismissal and that he had the right to view it even though it may have come from third parties. He feared that the information could affect future employment consideration and he had the right to dispute any of the entries on his file.

This complaint was very carefully and thoroughly investigated. The complete file containing the records in question was examined and it was determined that there had been ten pieces of documentation which had been severed from the file and to which the applicant had not been granted access. We studied this information very carefully in light of The Freedom of Information Act and the exemptions contained therein. Both the complainant and the department were given an opportunity, by way of an interview, to make representation respecting the complaint.

After a complete review of the complaint, I formally recommended to the department that the complainant be granted access to six of the ten documents to which access had been refused. It was my opinion that the other four documents should remain exempt, one under Subsection 48(1) of the Act, dealing with third party reports and the remaining three documents under Subsection 41(1) which is an exemption which the department had not used, but is one which I felt to be very relevant as it deals with the protection of the personal privacy of a third party. It was my opinion that release of the infor-

mation in the three documents would constitute an unreasonable invasion of the privacy of third parties. My findings and recommendation was conveyed to the department and the complainant. The department agreed with my recommendation and our complainant was granted access to the documents recommended. Regarding the refusal of access on the remaining documents, I advised the former employee of his right of appeal to the court and closed our file.

The Accessibility of Unit Prices

88-260-0002-F3 **Manitoba Government Services**

Complaint: Refusal of Access
Finding: Not Supported
Disposition: Report, Dismissing
Complaint
Result: No Action
Required

The branch manager of a foodservice company complained to our office about the refusal of access to a tender after it had been awarded to two other companies. He had applied to the department for this information and had received a response advising him of the specific items included in each of the two contracts awarded under the tender and of the total price of each contract. However, what the foodservice manager wanted was details relating to the unit prices within these contracts and this information was denied under Subsection 42(1) of The Freedom of Information Act. This subsection states that the head of a department **shall** refuse to give access to any record which discloses financial, commercial, scientific or technical information supplied to a department by a third party on a confidential basis and treated consistently as confidential information by the third party.

Our investigation involved a complete review of the files held by Manitoba Government Services on this matter, discussions with appropriate personnel at the Purchasing Bureau of Manitoba Government Services, discussions with the Federal Information Commissioner's office, and discussions with representatives of other companies which had been involved with bidding on this tender. Also, in accordance with Section 20 of The Freedom of Information Act, the complainant and the head of the department were given an opportunity to make representations respecting the complaint.

Our limited research indicated that there is a variety of practices across the country and even within the Province with respect to the disclosure of informa-

tion concerning tender bids. For example, on the federal level we understand that consistently there is no disclosure on information provided by the unsuccessful bidder and that only information on the successful bid is provided and then only on total prices and not on individual unit prices. The position taken by companies bidding on federal contracts is that the bids are provided in confidence and the companies do not want their bids released on the grounds that there could be financial injury and it could undermine their competitive edge. The position taken on the federal level and supported by the Federal Freedom of Information Commissioner's office is that it is not unreasonable for agencies to withhold information on individual unit prices and to withhold all information received from unsuccessful bidders. However, the Federal Freedom of Information Commissioner supports the position that agencies should check with the third party before refusing access and if the third party does not object the information should be released.

Looking provincially, we note that the Province of Alberta opens bids publicly and names the bidders, the unit price and the total price; British Columbia does not have a public opening, but provides the name of the successful bidder and the total price, and will provide unit prices if hard pressed; Saskatchewan has a public opening and provides the unit and total prices; in Thunder Bay, Ontario unit price bids are released; and in New Brunswick unit price bids are made available to the public for viewing. Within the Province of Manitoba different departments and agencies have different policies with respect to releasing information of this type, for example the Department of Highways and Transportation has a public opening and provides the total price, while Manitoba Hydro and the Manitoba Telephone System name the successful bidder and provide the total bid price and the unit price.

Regardless of what may be done by other departments or agencies within the Province, and regardless of what may be done by jurisdictions outside the Province the fact remained that this complaint was against Manitoba Government Services and we had to look closely at whether it was appropriate for that department in light of its policies and practices and in light of The Freedom of Information Act to have refused the information requested. Our review of this matter indicated that information supplied to Manitoba Government Services on tender bids had been consistently supplied by companies on a confidential basis and had been consistently treated that

way by the department. Our check with the two companies who received the contracts confirmed that they felt their information had been submitted to the department on a confidential basis and they did not want their unit price bids released. It would appear that in Manitoba these companies had not released their unit prices in the past and they had treated them consistently as confidential information, which if released might adversely effect their competitive position.

Because of the fact that the Purchasing Bureau of Manitoba Government Services had consistently in the past received and treated tender bids from third parties as confidential information and because the third parties had supplied this information on a confidential basis and consistently treated it as such, I did not feel it was unreasonable for the department to have refused access to the information. I believed, under the circumstances, that the information was exempt under Section 42 (1)(b) of The Freedom of Information Act, and I was therefore not prepared to recommend that access be given.

Although I did not feel that I could recommend access in this particular case, I did feel that Manitoba Government Services should give some consideration to the question of how it will in the future handle information relative to tender bids. Having noted that there are a number of jurisdictions where unit price bids are made public knowledge, apparently without any adverse effect, I suggested to the department that it may want to reconsider its policies and practices and develop a policy whereby unit price bids are not submitted on a confidential basis. I believe that the spirit and intent of The Freedom of Information Act is to allow for openness and access to information wherever possible and I believe that the department should attempt to develop a policy which leans in that direction. In this regard the department agreed to review its policies and procedures, and in fact had already commenced doing so.

Our office closed its file on the complaint advising the complainant that whereas I was not recommending access to the information requested, if he wished to pursue the matter further he could appeal the refusal of access to the Court of Queens Bench by filing an Originating Notice of Motion within thirty (30) days of receiving my report. Although the complaint file was closed, our office will be following-up in due course the outcome of the department's policy review.

A Question of Jurisdiction

88-340-0001-F3 A Manitoba Planning District

Complaint: Refusal of Access
Finding: Undetermined
Disposition: Discontinued by Complainant
Result: No Action Required

This complaint was presented by a lawyer on behalf of his client. The complaint was submitted by letter and was not on the prescribed complaint form.

Essentially the lawyer had applied (on the proper application for access form under The Freedom of Information Act) to a planning district for certain information relating to the building or development of a dwelling erected on a certain lot in a particular locality. The Planning District responded, through its lawyer, indicating that The Freedom of Information Act applied only to departments of the provincial government and it was the District's view that they therefore had no obligation to respond to the application for access. It was indicated, however, that the information sought would be made available if The Planning District Board were named party to litigation.

Our complainant was of the view that The Freedom of Information Act was applicable to a planning district and that citizens "should not be required to engage in unnecessary litigation by joining crown agencies for the purpose of getting production of public documents only with all the attendant costs not only to the person seeking access but also to the crown agency in defending the action." He asked that the Ombudsman accept his letter as a complaint and issue a ruling accordingly. I advised the complainant that Subsection 15(3) of The Freedom of Information Act requires that every complaint be in prescribed form, and I sent him a form for that purpose. Hearing nothing further from the complainant, it was obvious that he no longer wished us to pursue the matter, so with the refusal issue undetermined I closed the file as discontinued by complainant with no further action required.

Accessibility of Canadian Security Intelligence Service Agreement Schedule

88-110-0001-F3 Manitoba Attorney General

Complaint: Refusal of Access
Finding: Not Supported
Disposition: Report Dismissing Complaint
Result: No Action Required

In this particular case, an individual submitted to the department an application for access to:

"1986-1988 records on Manitoba's position, or description of, or assessment if entering into an agreement with the Canadian Security Intelligence Agency. Reasons for refusal to enter into such an agreement, current status and implications."

The application was received by the department and partial access was granted. The applicant was provided with a copy of the agreement or "Memorandum of Understanding" which was entered into by the Province of Manitoba and The Canadian Security Intelligence Service (CSIS). However, it was indicated to the applicant that certain aspects of the agreement were severed from the records because of falling within the following exemptions of The Freedom of Information Act:

Subsection 39(1), clause (a); Subsection 38(1); Subsection 45(1), clause (a); and Subsection 45(1), clause (b).

The aspect of the agreement severed under the Act was a schedule to the Memorandum of Understanding which lists the departments and agencies to which the agreement applies. The applicant was not in agreement with the department's response to his access application and filed a complaint with our office stating:

"I appeal the blanket use of exemptions 38, 39, 45 by the Manitoba Attorney General to deny me 1986-88 data surrounding the refusal to enter into an agreement with CSIS, current status and the agreement's implications. While the agreement was provided, no effort was made to sever the rest of the data sought and given public interest in this agreement and a degree of public media coverage on this issue, severe secrecy is unwarranted."

The complaint was carefully investigated. Firstly, appropriate contact was made with the Department of the Attorney General to find out what information had been severed from the information which had been submitted to the applicant, and to determine if, in my opinion, that severed information did in fact warrant exemption from release under The Freedom of Information Act. At that time a review of the complete file on the Canadian Security Intelligence Service (CSIS) agreement was undertaken and an interview was conducted with the appropriate departmental official (the Director of Law Enforcement Services) responsible for the custody of that particular file. From our discussion with the Director of Law Enforcement Services, it was our understanding that the Department of the Attorney General, based on the wording of the request, felt that the application had been specifically for access to the CSIS agreement and hence they gave primary consideration to that agreement (referred to as the Memorandum of Understanding) and its attached schedule, when dealing with the application for access. The result was that, as mentioned earlier, a copy of the "Memorandum of Understanding" was released; however, the schedule to the Memorandum of Understanding was not released as it was felt that this was exempted under the Act.

While the department maintained that it felt the request for access related primarily to the Memorandum of Understanding and the schedule, the department, in refusing access to the schedule, did cite several subsections of The Freedom of Information Act in what would appear to me to have been an effort to exempt not only the schedule to the Memorandum of Understanding but also, any and all other information contained in the CSIS file.

In this particular complaint I had some concern about the department's response to the application for access. If, as was indicated to us, the department felt that in providing the applicant with a copy of the Memorandum of Understanding it was providing everything that was requested, except for the schedule, then in my opinion the letter from the department to the applicant should have been worded differently. The letter should have simply stated the appropriate section of The Freedom of Information Act under which the schedule was being exempted and should have refrained from listing all the other subsections which presumably apply to the rest of the CSIS file. The letter could have explained that with the release of the Memorandum of Understanding, the department felt it granted all the information requested with the exception of the schedule, which was being severed under the appropriate

exemption clause under the Act. As well, the letter could have indicated that there was no refusal to enter an agreement with CSIS; the letter could have indicated that the status was that an agreement had been entered and was in place and that the implications could be deduced from a reading of the Memorandum of Understanding.

If, on the other hand, the department had had some questions about whether the application for access referred to more than the Memorandum of Understanding and schedule, then I feel the department could have, and should have, made some attempt to communicate with the applicant for clarification regarding the application, even though I agree that there is some onus on the part of an applicant to be as specific as possible in identifying the information being sought.

In any event, during the course of investigating this complaint, I spoke with the applicant who clarified for me that in making his application for access to the department he was interested in more than the Memorandum of Understanding and the schedule. He indicated that he was interested in all the background information or "paper trail" relevant to the CSIS agreement such as interdepartmental memoranda, letters, policy statements, etc. He stated that in fact, he was interested in all the information surrounding the negotiation of this agreement and that the wording on his application concerning "refusal to enter into such an agreement" was because he understood that initially there had been some reluctance on the part of Manitoba to enter into an agreement. I indicated to the complainant that we had completed an initial review of the CSIS file and from the review it was my opinion that the kind of information he was seeking, apart from the Memorandum of Understanding, would in fact be exempt information under the various subsections of The Freedom of Information Act listed in the letter he received from the department. I stated to him that I would, however, do a more detailed review of the CSIS file in order to formalize my opinion with respect to the information to which he was seeking access.

After completing my investigation of this complaint I reported my findings to the complainant and the department. Firstly, with respect to the schedule to the Memorandum of Understanding between the Canadian Security Intelligence Service and the Government of Manitoba, I was of the opinion that this schedule is exempt from release, not particularly under any of the subsections of the Act cited in the letter sent to the applicant but rather, under Section 44 of the Act which reads as follows:

"Federal - provincial relations.

44 The head of a department may refuse to give access to any record the disclosure of which could reasonably be expected to be injurious to the conduct by the government of federal-provincial relations."

In essence the Province of Manitoba had made a commitment to the Canadian Security Intelligence Service, in accordance with the wishes of the latter, that the province would not release the schedule listing the agencies, departments and services. This commitment was made both orally and in writing prior to the signing of the Memorandum of Understanding. From our review of the file, we noted the documentation which substantiated that such a commitment was made. Therefore, if the provincial government were to release this information such disclosure could be seen as a breach of trust and could reasonably be expected to be injurious to the conduct by the government of federal-provincial relations. I, was therefore, not prepared to recommend the release of this document as I believe the document falls within the discretionary exemption under Section 44 of The Freedom of Information Act and in this case, it was not clearly wrong or unreasonable for the head of a department to use discretion to deny access.

With respect to all the other information contained in the CSIS file, I was of the opinion, after a thorough review of the file, that most of this information is exempt under Subsections 38(1), 39(1), 40(1), 41(1), and 45(1) as this information deals with cabinet confidences, policy opinions, advice or recommendations, law enforcement and legal proceedings, information obtained in confidence from a third party and information obtained in confidence from other governments.

There was, however, on the CSIS file information which I did not consider to be exempt under The Freedom of Information Act, namely:

1. A newspaper article from the Winnipeg Free Press
2. Transcripts of the Hansard recordings of questions and answers around the CSIS agreement, and
3. Certain published articles on CSIS

The reason I felt this information was not exempt from release is because the public would normally have access to such information through the newspaper, through the Hansard office, and through subscriptions to or direct purchase of the magazines which published the articles. I respectfully suggested that if the complainant wished access to that infor-

mation, which in my opinion could be released from the CSIS file, then he should file another application for access specifically indicating that that was the information to which he wished to have access. However, as for all the other information in the file of the Department of the Attorney General on the Canadian Security Intelligence Service, I was not prepared to recommend that access be granted.

I advised the complainant that if he wished to pursue the matter further, in accordance with Subsection 30(1) of The Freedom of Information Act, he could appeal the refusal of access to the Court of Queen's Bench by filing an Originating Notice of Motion within thirty (30) days of receiving my report. Our file was then closed.

Records Concerning Consultant's Contract

88-370-0002-F3 Manitoba Northern Affairs

Complaint: Refusal of Access
Finding: Partially Supported
Disposition: Report, with Recommendation
Result: Remedial Action

An application for access was presented to Manitoba Northern Affairs requesting:

- "All records relating to the hiring of a consultant to negotiate an agreement between Manitoba & Pioneer Metals: specifically,
- Terms of reference
 - Fees & Costs
 - Job Qualifications of The recipient of The contract
 - Process for Selecting The Consultant"

The Access Officer for the department responded to the application advising that all records in this regard were being denied under Subsections 42(1)(c)(iii) and 43(d) of the Act, which deal with commercial information belonging to a third party. The applicant was not happy with the response and filed a complaint with our office.

This complaint was very carefully and thoroughly investigated. The complete file containing the records in question was examined. With respect to the four items which had been specifically requested in the application for access, it was noted that information concerning the first two items (terms of reference, fees and cost) was contained in an agreement for consulting services between the Government of Manitoba and the consultant. There was no infor-

mation on file concerning the qualifications of the recipient of the contract, and, in any event, any information pertaining to the job qualifications of the consultant would be exempt under Subsection 41(1)(a) which reads as follows:

Protection of personal privacy.

"41(1) Subject to subsections (3) and (5), the head of a department shall refuse to give access to any record the disclosure of which would constitute an unreasonable invasion of the privacy of a third party, including but not restricted to a record which disclosed

(a) personal details of the educational, medical, criminal, employment or family history of the third party; . . ."

Concerning the process for selecting the consultant, it was our understanding that the consultant was selected on the recommendation of the Minister of Northern Affairs. There were no departmental records regarding the matter, other than a pre-clearance submission to Treasury Board by the Department of Northern Affairs, and that document would, in my opinion, be exempt information under Subsection 38(1) dealing with Cabinet confidences.

From a careful review of the file, it appeared that the only document which required serious consideration with respect to the application for access, was the agreement between the government and the consultant, which, as indicated earlier, related to the terms of reference and fees and costs associated with the hiring of a consultant to negotiate an agreement between Manitoba and Pioneer Metals.

In the course of our investigation, and in accordance with Section 20 of The Freedom of Information Act, both the complainant and the head of the department were given a reasonable opportunity to make representations respecting the complaint. My assistant and I met with the complainant and reviewed in some detail his complaint. At that time, I indicated my opinion that information regarding the job qualifications of the recipient of the contract would be exempt by The Freedom of Information Act and also that there was, apparently, no process documented for selecting the consultant other than a recommendation by the Minister. During our interview, we heard from the complainant as to why he felt the agreement with the consultant would not be exempt from release under The Freedom of Information Act, and particularly under the Sections cited in the refusal letter sent by the department. It was the complainant's view that release of an agreement which might outline the scope of the negotiations to be conducted between the consultant and the mining com-

pany, would not present a problem and would not interfere with the negotiations between the consultant and the mining company. It was also his opinion that the negotiations were of a tripartite nature, involving not just the government (represented by the consultant) and the mining company, but also, the community; and, in fact, he indicated that there had already been community involvement in this matter. The complainant further felt that giving access to the consultant's agreement could not reasonably be expected to injure significantly the financial interests of a department or the government, nor, would such disclosure result in undue gain to any person or organization.

Pursuing this complaint, we met with a delegation representing the head of the department of Northern Affairs. The delegation included the Deputy Minister, the Acting Assistant Deputy Minister, the Access Coordinator, and Crown Counsel. We had a very lengthy and thorough discussion as to why the department felt that the consultant's agreement should not be released. In essence, the department felt that the release of this agreement, which includes an outline of the scope of the negotiations to take place between the consultant (representing the government) and Pioneer Metals, could reasonably be expected to prejudice the competitive position of the government or interfere with the negotiations of the government. The department indicated that the negotiations were not of a tripartite nature but rather that the negotiations were strictly between the province and Pioneer Metals. It was indicated that the mine site in question, was not located in the community of Sherridon although it is near that community. It was also pointed out that the community of Sherridon, while it had its own mayor and council, comes under the jurisdiction of the province by means of The Northern Affairs Act. Any involvement of the community or any sharing of information with the community is entirely at the discretion of the province. It is our understanding from the information provided by the department, that once an agreement has been signed between the province and Pioneer Metals, all information concerning the consultant's agreement as well as the agreement with Pioneer Metals will be made public. However, until the agreement with Pioneer Metals has been concluded, the department prefers to do its negotiations directly with Pioneer Metals and not in a public forum.

After giving very careful consideration to all relevant information on this matter, I was of the opinion that the particular section of the consultant's agreement (Section 2) which outlined the scope of the negoti-

ations with Pioneer Metals, was exempt information under The Freedom of Information Act, specifically, under Subsection 43(c) in that disclosure could reasonably be expected to prejudice the competitive position of the government or interfere with negotiations. The rest of the agreement, I felt could be released and accordingly I recommended to Manitoba Northern Affairs that the complainant be granted access to the agreement for consulting services between the Government of Manitoba and the consultant with the exception of Section 2 which could be severed from the agreement on the basis of being exempt information under The Freedom of Information Act. My recommendation was accepted by the department and the complainant was advised that he could have access to the severed agreement, and as well, was advised of his right of further appeal to the Court.

The Protection of Personal Privacy

88-260-0003-F3 **Manitoba Government Services**

Complaint: Refusal of Access
Finding: Not Supported
Disposition: Report Dismissing Complaint
Result: No Action Required

The applicant, in this case a civil servant, had entered a job competition and, not being the successful candidate, following the competition applied to the department to have access to the records of the interviews held as he wished to know how each of the candidates, including himself, had been graded on each question by each one of the selection board members. The application for access was denied under: Subsection 39(1)(a)(iii) dealing with policy opinion, advice or recommendations; Subsection 41(1) dealing with protection of personal privacy; and Section 46 dealing with testing or auditing procedures.

The applicant, not satisfied with the response, complained about the refusal, expressing his view that the selection board "acted contrary to a just evalua-

tion and selection of candidates for the position bulletined."

The Ombudsman explained to this complainant that it is not the responsibility of the Ombudsman, under The Freedom of Information Act, to review whether there was a just evaluation and selection of candidates for the position bulletined. It was further explained that while under The Ombudsman Act, that question may possibly be considered for review (subject to whether other appeal mechanisms are available and appropriate) it certainly would not be a matter for review under The Freedom of Information Act. I indicated that under The Freedom of Information Act the Ombudsman would be looking solely at the request for access to information and whether or not the information requested is exempt information under the Act.

In the course of reviewing this concern, my assistant clarified for the complainant the scope of our review. It was my understanding from discussions with the complainant that he had appealed to the Civil Service Commission his concerns about the selection of candidates for the position bulletined, and that a hearing has been scheduled in that regard. I further understand that the Civil Service Commission provided him with information showing the points he received during his interview and the areas where he reportedly met the requirements of the job as well as the areas where he reportedly did not. The provision of this information I felt satisfied in part the request for access as stated on his application under The Freedom of Information Act in that it would indicate how he was graded as a candidate for the job in question.

With respect to the complainant's application for access to other information concerning the interviews, and in particular information concerning the other candidates, I reviewed the department's file on this matter and I was in agreement with the department's assessment that such information is exempt under the sections of The Freedom of Information Act which were cited in the department's letter of refusal. Consequently, I was not prepared to make any recommendation in this case. The complainant was so advised and informed of his right of appeal to the Court.

Food for Thought

Having received only eight cases during 1988, it would be presumptuous to attempt to identify trends or patterns by departments in their handling of freedom of information matters. However, even with this limited number of cases there are some things that have come to light which I feel are worthy food for thought for all involved with access to information concerns.

1. **It is important that departments and agencies properly document their handling of applications for access under The Freedom of Information Act.** We note that each of the departments we dealt with had some system of recording and documenting their activity around access applications, with some departments having a very elaborate and seemingly effective recording and tracking system. This is important because of the precise deadlines that have to be met when responding to applications under the Act.
2. **The date of receipt recorded by a department on the application and in department records, should be the actual date the application in prescribed form arrives at the department.** This actual date of receipt becomes the effective date from which the mandatory response time is measured. Therefore I believe it is important that all departments are consistent in this regard, and that we not have some considering the date of receipt to be the date an applicant visits an office and makes a verbal request with the actual application being submitted days later, other departments considering the date of receipt to be the date a telephone call is made, and still others considering it to be the date the department's mail is processed, which in fact may be a day or two after the mail has been received.
3. **When refusing access to records, departments should not overkill with the citing of exemptions.** Be as precise as possible as to why you feel information cannot nor should not be released and cite only the appropriate exemption. Giving a multitude of exemptions, simply to cover all bases and to be on the safe side, only raises unnecessary concerns and suspicions in the minds of applicants and often leads to an appeal being made which perhaps would not have been made had the refusal letter been clear and concise, citing only the relevant exemption clause or clauses.
4. **When refusing access to records, departments in their correspondence should not simply cite the exemptions clauses of the Act by Section or Subsection number, but should go all the way and give the exemption clause or clauses word for word.** It is helpful for an applicant who has been refused access to have as complete an explanation as possible presented in the letter of refusal. Departments should not assume that applicants are going to have ready access to a copy of the Act to flesh out skimpy letters of refusal. Apart from quoting the exemption clauses, departments may wish to elaborate in their own words, if required, so that a proper understanding of the situation may be received by the applicant.
5. **When applications for access are vague and confusing, department staff should try to assist applicants in clarifying, identifying, and being precise about the information being sought.** This approach will in the long term prove much more useful and rewarding than refusing access with numerous exemption clauses simply because the application is vague, confusing or too broad in scope to be meaningful. Such a refusal usually forces the applicant to appeal and during the appeal it may become clear that with a little communicative homework by department officials, the matter need not have gone that route.
6. **Department officials should keep in mind that applications must be responded to within thirty days after receipt of the application and that failure to respond within that time period constitutes a presumed refusal of access.** What sometimes happens is that a department or agency may very well intend to respond positively to an application by granting either partial or complete access, but because of the nature of the request, it may require a fair amount of time to research and prepare a response. The department's access officer gets caught up in this task and lets the 30 day time period slip by without responding to the applicant. The applicant then files a complaint with the Ombudsman, who at that point must consider and treat the matter as a presumed refusal of access. In the course of the investigation, it will usually be revealed that the department had no intention of refusing access but, was in fact in the process of obtaining and reviewing documents in preparation for a response granting access. Although such cases

can then be resolved informally, a lot of unnecessary work and confusion could have been avoided by the department remaining mindful of the time requirements under the Act and the option of seeking an extension if necessary, and perhaps more importantly by keeping in mind the usefulness of a little one-to-one communication, such as a phone call to the applicant explaining the situation.

7. **When dealing with the public, departments should operate in a spirit of openness, making available as much information as reasonably possible so that there will not be much need for individuals to have to submit formal applications for access under The Freedom of Information Act.**
8. **Department officials should try to assist individuals as much as possible to work their way through the application for access and the appeal process.** For example, if a department has refused access and in the letter of refusal has indicated the right to make a complaint to the Ombudsman, it would be a simple matter to enclose the prescribed complaint form thereby eliminating the need for the applicant to secure it elsewhere.

9. **While testing the system can on occasion be useful, it can also be very costly in more ways than one.** There are users who make it their business to test the efficiency of new legislation and the concomitant administrative processes. The Freedom of Information Act is not exempt from such consumers who oftentimes flood departments and agencies with applications for access, and appeal mechanisms with complaints if their applications are unsuccessful. While these consumers may have a genuine interest in the information they are seeking, often the underlying motivation for the application for access is not the information itself, but rather the question of the accessibility of the information. In fact, the applications are a test to see if the system works. While such testing in a proper fashion, is necessary at times and has proven its worth by bringing about changes and improvements in legislation and administrative systems, I would caution that any unnecessary testing involving frivolous and vexatious matters can do more harm than good. These types of applications and complaints not only cause unnecessary spending of the taxpayers' money, but lots of unnecessary frustration on the part of all concerned. Therefore, I would respectfully remind all that while The Freedom of Information Act guarantees a right of access to information, that right like any other right, should be exercised responsibly.